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COMMISSION ON HUMAN RIGHTS

SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND
PROTECTION OF MINORITIES

Forty-ninth session

SUMMARY RECORD OF THE 26th MEETING

Held at the Palais des Nations, Geneva,
on Friday, 22 August 1997, at 10 a.m.

Chairman: Mr. BENGOA
later: Mrs. WARZAZI

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The meeting was called to order at 10.20 a.m.

PREVENTION OF DISCRIMINATION AGAINST AND THE PROTECTION OF MINORITIES (agenda item 8) (continued) (E/CN.4/Sub.2/1997/18)

1. Mr. GOONETILLEKE (Observer for Sri Lanka) said that his delegation concurred with the Sub-Commission's decision to revise the title of the agenda item concerning the protection of minorities. The introduction of the word "against" was significant in the context of the collective endeavour to focus on the specific issues involved in the question. The report of the Working Group on Minorities on its third session (E/CN.4/Sub.2/1997/18) reflected notable progress from a theoretical to a pragmatic approach to protection issues.

2. In his delegation's view, the dichotomy between the concept of minority rights and the emphasis on the rights of persons belonging to minorities must not be allowed to vitiate the debate on minority protection, for the principle of universality and indivisibility of all human rights lay at the heart of the international human rights system, which extended protection to all individuals alike. Furthermore, misconceptions traditionally associated with the notion of minority protection should be dispelled. Too much emphasis should not be placed on any perceived collective rights. The current thinking within the Working Group on Minorities had been in consonance with the relevant provisions of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the Vienna Declaration and Programme of Action. Minority groups were not recognized as entities entitled to collective rights by those declarations and other relevant international human rights instruments.

3. The principle of equality before the law and equal protection under the law should be accepted as a measure safeguarding the rights of individuals, including persons belonging to minorities. The equality provisions of the Constitution of Sri Lanka, for example, contained safeguards against discrimination, though affirmative action in respect of vulnerable groups was permitted. The ongoing constitutional reform exercise was in part intended to expand and strengthen existing human rights protection provisions.

4. Restraint on the part of United Nations mechanisms was desirable where encouragement of cross-border affiliation was concerned. A cautious approach might dissuade a minority group of one country from exploiting such affiliation purely for political ends, especially when the group with whom it claimed affinities was numerically larger than the majority or even the total population of the country concerned.

5. It was equally important to protect the rights of "minorities within minorities". There had been a number of instances where the rights of persons belonging to numerically weaker minorities had been violated by groups belonging to numerically larger minorities. The forced expulsion of the Muslim population from the Northern Province of Sri Lanka and the attacks on Muslim villages and on places of worship by the Liberation Tigers of Tamil Eelam were a case in point. That group not only systematically committed violations of human rights and humanitarian law against minority groups in the Northern and Eastern Provinces, but was also engaged in disseminating false

propaganda and blaming others. Mr. Eide had drawn attention to the irony whereby such groups, who themselves flouted humanitarian standards, addressed human rights forums concerning violations by others. His delegation hoped that all those points would be taken into consideration in the ongoing endeavours concerning minority protection in the Working Group on Minorities, the Sub-Commission and the Commission on Human Rights.

6. Mr. BEREZNY (Observer for the Russian Federation) said that dozens of national and ethnic minorities lived in the Russian Federation, and that a legal base now existed for the protection of the rights of national minorities, first and foremost through dissemination of international standards in the Russian Federation, which had acceded to the framework Convention for the protection of national minorities. Minority rights were protected under the Constitution, the Citizenship Act, the Education Act and the National Languages of the Russian Federation Act. The new Criminal Code provided for the imposition of serious sanctions on those discriminating against citizens on racial, national and other grounds. The year 1996 had seen the adoption of the concept of a State policy vis-à-vis nationalities, and of the National and Cultural Autonomy Act. In application of that Act, national and cultural autonomy had already been granted to the German and Tatar minorities. The Government was also implementing federal programmes for the Ukrainian minorities and the Finno-Ugric, Turkic and other peoples.

7. Unfortunately, the generally unfavourable economic situation impeded the implementation of those progressive and democratic laws. Compliance with its own and with its international obligations was the hardest task currently facing Russian society.

8. The question of minorities was one of the most complex issues, not only in domestic policy but also at international level. More and more often, the position of minorities ceased to be a humanitarian issue and became one of maintenance of peace and security and friendly relations between nations. Double standards and an ad hoc approach were unacceptable in that connection. His delegation drew attention to the situation in the Commonwealth of Independent States (CIS) and the Baltic States, where discrimination against the Russian minorities was a daily occurrence. His delegation had constantly to draw the international community's attention to the dangers of those countries' policy of according priority to citizens of the titular nation, to the detriment of the rights of its national minorities. The situation of Russians in Estonia and Latvia was a matter of particular concern. According to the Council of Baltic Sea States commissioner for democratic institutions and human rights, the Estonian authorities were doing nothing to remove the barriers to granting of citizenship by naturalization.

9. According to the Organization for Security and Cooperation in Europe (OSCE) High Commissioner on National Minorities, in Latvia, too, not all its recommendations regarding the situation of the Russian-speaking population were being complied with, particularly with regard to simplification of the procedure for naturalization and granting of citizenship to children born in the territory of the Republic of Latvia. His delegation hoped that the dialogue between the Russian Federation and Latvia begun in

July 1997 on a whole range of humanitarian problems, as well as action by the Latvian State Bureau for Human Rights, would help improve the situation with regard to granting of citizenship.

10. The Russian Federation was doing everything in its power to ensure that its compatriots' problems were settled, and there had been some improvements. In 1997 there had already been two meetings of Russian and Estonian experts on humanitarian affairs. A Russian-Latvian intergovernmental commission had been set up, in which a working group on humanitarian questions was considering the situation of minorities. Dialogue between the States was being established, but difficulties persisted. The situation of human rights in those countries should thus remain a focus of international attention.

11. Mrs. DAES said that the report of the Working Group on Minorities on its third session (E/CN.4/Sub.2/1997/18) reflected the systematic and intensive work done by its five members in the short space of five days. She congratulated the Chairman-Rapporteur and the other members of the Working Group on their contributions to its fruitful debates and the valuable working papers they had submitted. She also drew attention to the remarkable working paper submitted by Mr. Gudmundur Alfredsson, entitled Encouraging and Monitoring Compliance with Minority Rights. She fully endorsed Mr. Alfredsson's concluding observations, to be found on pages 12 and 13 of his working paper.

12. She endorsed the statement, to be found in paragraph 17 of the report, that the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities must remain the focus of minority rights and that one of the roles of the Working Group was to review and promote the practical realization of the Declaration. One of the best ways to achieve that aim at global level was through international cooperation. In her view, the Declaration placed the rights of minorities on the agenda for international financial aid and technical assistance, not only from the Centre for Human Rights but from all the system's specialized agencies and operational programmes. Although the two International Covenants on Human Rights referred to international cooperation, they did so in a permissive rather than a directive context; whereas the Declaration stated plainly that the United Nations system "shall" contribute to the full realization of the rights and principles set forth in the Declaration, and that States "should" ensure the compatibility of international cooperation projects with the interests and rights of persons belonging to minorities. Thus, in her opinion, the rights of persons belonging to minorities were an objective and guideline applicable to the whole field of international cooperation.

13. In that respect the Declaration took a progressive approach to the realization of the rights of persons belonging to minorities, emphasizing development and international responsibility for securing that development. To that extent it was consistent with the philosophy of the Declaration on the Right to Development, being in fact the first human rights instrument to apply that philosophy to a specific field of action. Even in relatively wealthy countries minorities could be severely disadvantaged, and it was thus imperative to consider them as priorities for development if they were to

achieve genuine equality. She recommended that the Working Group should consider further exploring the role and protection of minorities in the context of international cooperation.

14. On the definition of minorities, various colleagues, notably Mr. Hatano, had pointed out that a universally acceptable definition was not attainable, at least at the current stage. In the past, attempts by Mr. Capotorti, Mr. Dechênes and others had been rejected by the Sub-Commission or the Commission. In her view, the same was true of the definition of the concept "indigenous". She had done a systematic study on the question, taking account, inter alia, of the important work done by Mr. Chernichenko on the definition of minorities. Nevertheless, her conclusion was that both the Working Group on Indigenous Populations and the Working Group on Minorities should continue their constructive work without persisting in the vain quest for a definition. The latter group might consider elaborating certain criteria applicable in determining what categories of persons belonged to minorities.

15. She supported the conclusions and recommendations contained in paragraphs 105 to 125 of the report, and in particular recognized the importance and usefulness of the manual referred to in its paragraph 108. However, in view of the financial crisis in the United Nations and the large number of minority languages, she believed that it might be more realistic to begin by preparing the manual in the six official languages of the Organization.

16. Mr. EIDE, Chairman-Rapporteur of the Working Group on Minorities, thanked all those members who had contributed to the debate under agenda item 8, including the many non-governmental organizations (NGOs) that had taken the floor. The information they had provided and the ideas and suggestions they had proposed were greatly welcomed and would be taken into account in the future work of the Working Group. In particular, he wished to thank Minority Rights Group for its important support over the years, and International Service for Human Rights, which had offered assistance for the organization of the seminar on multicultural and inter-cultural education.

17. He also appreciated the statements made by government observers, both in the Sub-Commission and in the Commission at its most recent session. He could assure those observers that due account had been taken of the various views expressed during the Commission's deliberations on that item, as required under paragraph 12 of its resolution 1997/16. The Working Group's main source of guidance would be the expectation expressed in that resolution, that it would further implement its mandate as set out in Commission resolution 1995/24, with the involvement of a wide range of participants.

18. He had noted strong support from all speakers in the Sub-Commission - and also in the Commission at its most recent session - for the continuation of the Working Group. Many had pointed out that the topic was possibly the most important one with which the Sub-Commission dealt, and that the activities of the Working Group proved the importance of the Sub-Commission as a whole. There had also been generally strong support for the approach taken thus far, and unanimous support for most of the recommendations contained in the report.

19. Mr. Khalifa had raised a fundamental point, corresponding to a large extent to what in his own first intervention he had referred to as inflated claims of self-determination, whereby groups challenged the territorial integrity of States and sometimes took up arms for that purpose. That, however, occurred when the groups concerned refused to consider themselves as minorities but claimed instead to be "nations" or "peoples". The Working Group consistently stressed that it took as its basis the Declaration of 1992, which in its preamble stated that the promotion and protection of the rights of persons belonging to minorities contributed to the political and social stability of States in which they lived, and in its article 8, paragraph 4, stated that nothing in the Declaration might be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States. He very much agreed with Mr. Khalifa on the need to avoid misuse and manipulation. The risk was much greater, however, when the leaders of a group claimed that it was not a minority but a people and therefore entitled to the right to self-determination. That was one of the reasons why he was reluctant to accept a definition of minorities that excluded such groups.

20. Mr. Yimer, while generally expressing strong support for the Working Group and endorsing many of its recommendations, had raised some fundamental questions relating to the understanding of the mandate. Mr. Fan Guoxiang had raised some of the same concerns.

21. The first issue raised by Mr. Yimer had referred to the suggestion made in paragraph 114 that wider use could be made of bilateral treaties. The question of whether that fell within the mandate depended on the interpretation placed on article 6 of the Declaration, which called on States to cooperate on questions relating to minorities. It was his understanding that that article referred in particular to neighbouring States in which members of the same ethnic group lived on both sides of the frontier. In his view, one way in which such cooperation could be arranged was through the use of bilateral treaties. They were not always suitable, and could cause problems when a powerful State imposed a bilateral arrangement on a weak neighbour; but the experience of such treaties should be studied, and use made of them when appropriate. It was essential, however, as was stated in paragraph 114, that the treaties should reflect universal and regional human rights instruments and that equitable provisions for the settlement of disputes should be contained in them.

22. The second set of questions relating to the mandate was the listing of themes for further work in paragraph 124. Mr. Yimer had wondered whether the theme of the relationship between the protection of the rights of minorities and population displacement, migration and refugee flows was beyond the mandate of the Working Group. In that connection he drew attention to Sub-Commission resolution 1995/13, which in its paragraph 6 requested the Working Group to examine, inter alia, as part of its mandate concerning the examination of possible solutions to problems involving minorities, issues relating to forcible displacements of populations, including threats of removal, and the return of persons who had been displaced. He assured members that the Working Group was not going to deal with the issues of migration, population transfers and refugee flows generally - which would go far beyond

the mandate - but only with those aspects of the question which were either directly caused by lack of minority protection or which gave rise to new minority problems.

23. On the question of whether the recommendations relating to conflict prevention and resolution and the diffusion of tensions were beyond the mandate of the Working Group, he drew attention to paragraph 25 of the Declaration and Programme of Action of the World Conference on Human Rights, which called on the Centre for Human Rights to provide, as part of its programme of advisory services and technical assistance, qualified expertise on minority issues and human rights, as well as on the prevention and resolution of disputes, to assist in existing or potential situations involving minorities. Moreover, the General Assembly, in its resolution 48/141 establishing the post of High Commissioner for Human Rights, had stated that he or she should provide through the Centre advisory services and technical assistance and should engage in dialogue with Governments. He concluded, therefore, that it would be within the mandate of the High Commissioner to develop and implement procedures for conflict prevention if they were strictly based on human rights, including the rights of persons belonging to minorities.

24. As for whether it was within the mandate of the Working Group to be a forum for constructive dialogue by "finding methods of diffusing tensions and preventing conflict", he agreed with Mr. Yimer and Mr. Fan that it would be wise not to be overambitious in that regard. The phrase was intended to reflect the part of the mandate under which the Working Group would promote mutual understanding between and among minorities and Governments. He agreed with Mr. Fan that the Working Group should be both active and prudent in its further work.

25. Mr. Guissé had rightly pointed out that the issue of citizenship was important to everyone, not only members of minorities. The Working Group had addressed that issue because disenfranchisement or denial of citizenship sometimes had as its main purpose or effect the exclusion, in particular, of members of an ethnic group from enjoying full rights in the society concerned. However, the Working Group's interpretation was that citizenship was not a requirement for enjoying the rights contained in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. As regards the suggestion in paragraph 18 of the report that citizenship should be extended liberally to all who made a State their permanent home, it was generally true, as Mr. Bossuyt had pointed out, that citizenship was a fortiori for Governments to bestow. However, that principle had been somewhat modified by international human rights law, since in cases of State succession, in particular, the issue of citizenship was not purely an internal matter. There was undoubtedly a need for the Working Group to study the issue in greater depth.

26. He agreed with Mr. Guissé that, like everyone else, members of minorities had duties as well as rights, including the duty to respect the rights of all other members of society and to respect the laws of the country in which they lived.

27. On the question of the definition of minorities, he had no problems with paragraph 1 of Mr. Chernichenko's definition (E/CN.4/Sub.2/AC.5/1997/WP.1), which was open enough to cover all necessary situations. He believed that every ethnic, religious or linguistic group which formed less than half of the population was in a minority situation, but only had minority problems when the majority sought to block it from practising its culture, using its language or professing its religious faith. He did have a problem with the exceptions in article 6 of the annex; he noted, however, that the definition was only proposed as a guideline and did not foresee that those differences would have any practical consequences for the future work of the Working Group.

28. With regard to the question raised by Mr. Hatano on the preparation of manuals in minority languages when no definition of minorities existed, he said it was usually self-evident which language, in a country were minority languages, and it would be impractical anyway, at least initially, to cover every single minority language.

29. With regard to the suggestion by Ms. McDougall and some NGOs that the Working Group should consider the situations of the Afro-American minorities in various parts of the Americas, he said those groups had already made contributions to the work of the Working Group and assumed that their situations would be given even more space in future sessions.

Statements equivalent to the exercise of the right of reply

30. Mr. NAZARIAN (Observer for Armenia) said that for historical reasons an overwhelming majority of Armenians lived outside Armenia, exchanging their cultural background for security in their host State, while retaining their identity.

31. He called the attention of the Observer for Azerbaijan and members of the Sub-Commission to the horrible fate suffered recently by Armenians living in the Azeri cities: following pogroms and mass killings initiated by the majority Power, 332,000 Armenians had been forced to flee. Those barbaric acts, carried out with complete impunity, were in response to the legitimate call of the population of Nagorny Karabakh for the right to self-determination. The situation in Nagorny Karabakh was not a minority issue, since Armenians were in the majority in their ancestral lands. The liberation movement representing the 250,000 Armenians living in Nagorny Karabakh was no different from many other liberation movements which had successfully created so many of the States Members of the United Nations. Their struggle was rooted in a natural aspiration to live in peace and security.

32. Mr. MOUSSAEV (Observer for Azerbaijan) said that Azerbaijan, unlike Armenia, was a multi-ethnic and multi-religious State where more than 80 ethnic and linguistic groups with several religions had lived together in a spirit of tolerance and harmony for centuries. The equality of all citizens, irrespective of their origin, religion or language, was guaranteed by the law. The people's will was expressed through participation in the process of representative democracy.

33. Before the armed conflict with Armenia, the Armenian community in Azerbaijan had enjoyed political, economic and cultural autonomy within Azerbaijan. In contrast, of the 600,000 Azerbaijanis living in 1918 in what was now Armenia and forming a third of the population of that area, not one remained there, as a result of a deliberate policy on the part of the Armenian Government. The forcible expulsion of the last 200,000 Azerbaijanis from their historical homelands in 1988, carried out on the instructions of the Armenian authorities, had been accompanied by the killing and maiming of hundreds of Azerbaijanis. As a result of that "ethnic cleansing", Armenia had become a mono-ethnic State, with virtually no ethnic or religious minorities living there. That was why it was so easy for Armenia to advocate the realization of the right to self-determination without limits.

34. Mr. NAZARIAN (Observer for Armenia) said the statement by the representative of Azerbaijan could only be seen as a crude and gross violation of the norms and principles of international law. Azerbaijan continued to promote an aggressive nationalism and ethnic hatred directed at the population of Nagorny Karabakh. While claiming it could guarantee peace and security in that area, Azerbaijan spread distrust by levelling false accusations at Armenia and denying its own responsibilities in Nagorny Karabakh. Pogroms had been carried out in dozens of Armenian villages and communities in Nagorny Karabakh in 1988. Many cases of atrocities, such as burning people alive, had been documented. Such cases were not only violations of human rights, but also revealed that Azerbaijan had a deliberate policy not to guarantee the security, rights and freedoms of nations under its jurisdiction, and that it could give no such guarantee to the people of Nagorny Karabakh. He reiterated the warning given by the President of Armenia at the Lisbon Summit that the imposition of Azerbaijani rule in Nagorny Karabakh would leave the people there facing the threat of genocide.

35. Mr. MOUSSAEV (Observer for Azerbaijan) said that the groundless allegations made by the representative of Armenia showed that Armenia had no intention of solving the conflict or giving up its territorial claims to Azerbaijan. The position of the Armenian Government in connection with the resolution of the armed conflict was contrary to the position of the international community, as reflected in the decisions of the United Nations Security Council and General Assembly, the Organization for Security and Cooperation in Europe, the Council of Europe and other international organizations. How could Armenia settle the conflict if it rejected the generally accepted norms of international law and the position of the international community?

36. He called on the Government of Armenia, through the Chairman, to follow the civilized approach towards peaceful settlement of the conflict and the building of inter-State relations on the basis of respect for the territorial integrity and inviolability of the internationally recognized borders of States.

37. The CHAIRMAN said that the Sub-Commission had concluded its consideration of agenda item 8.

FREEDOM OF MOVEMENT:

(a) THE RIGHT TO LEAVE ANY COUNTRY, INCLUDING ONE'S OWN, AND TO RETURN TO ONE'S OWN COUNTRY, AND THE RIGHT TO SEEK ASYLUM FROM PERSECUTION;

(b) HUMAN RIGHTS AND POPULATION DISPLACEMENTS

(agenda item 10) (E/CN.4/Sub.2/1997/22 and 23)

38. Mr. AL-KHASAWNEH, Special Rapporteur on the human rights dimensions of population transfer, introducing his third and final report (E/CN.4/Sub.2/1997/23), said that he wished to place on record his indebtedness to Dr. C. Beyani who had undertaken most of the research and the preparation of the initial drafts.

39. Before turning to the report itself, he wished to make a number of general remarks. In the first place, the topic of forcible population transfer covered an exceptionally wide range of acts and activities, State and non-State actors and situations. The situations ranged from acts of genocide, such as ethnic cleansing, to acts motivated by a wish for social and economic development within a State, such as the building of a large dam. Clearly the rules governing such acts could not be the same; in the first example, clear prohibitions and possibly the criminal responsibility of a State or leader were engaged, whereas in the second the question was one of weighing conflicting rights and ensuring that no innocent victims were left to bear their losses alone.

40. Secondly, in approaching the subject of population transfer, one should be acutely aware that public international law already included rules prohibiting or regulating various aspects of forcible population transfer, such as article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, various articles of the International Covenants on Human Rights or a number of declarations forming part of what was known as "soft law". In deciding on the ultimate form that the current exercise should take, the Sub-Commission should bear in mind that not all those rules carried the same weight, not only because of the classic distinction between hard and soft law, but also because some were part of customary law while others were contractual in nature.

41. Thirdly, population transfers infringed on many human rights, such as the right to housing or social security, but no enumeration of those rights could capture the sense of loss that arose from exile, let alone qualify or remedy it for that loss pertained to the very essence of the human being. It was no wonder that the great exiles of the past had left an indelible mark on the collective personality of peoples and led to endless conflicts. The depth of feeling and sense of loss one encountered in speaking to exiles, whether Palestinians or Bosnians, was difficult to translate into a legal instrument. Thus, the belief that ethnic cleansing or the creation of a refugee problem solved any problem was a grossly mistaken one, quite apart from its innate legal and moral reprehensibility.

42. Fourthly, international law provided simple recipes to deal with the complexities that ensued from population transfers. Restitutio in integrum, consisting of the right to return and compensation for damage inflicted, should, in his opinion, continue to be insisted upon. In practice, however, reversing a situation that had become entrenched was exceedingly difficult, if not well-nigh impossible, and not always desirable or just when people, as opposed to chattel, were involved. For example, to demand compensation for the many people exiled under the apartheid regime in South Africa would place a burden on the citizens of a now democratic South Africa. Another problem was that the passage of time created a relationship between the exiled population and the receiving State and its population; exiles set down new roots. It therefore seemed to him that the concept of the right of return was not always a magic solution.

43. Fifthly, there was also an inherent antagonism between peace and justice. Peace was an act of accommodation and of compromise. In the interests of peace, essentially unprincipled solutions to conflicts were reached. Justice, on the other hand, consisted of the reversal of situations, the wiping out of original wrongs, but that usually meant a continuation of conflict and perhaps even more injustice. As conflicts came to an end, the tension between justice and peace became sharply focused. For example, in the peace treaty between Jordan and Israel it was stated that the refugee problem would be solved on the basis of international law once the final status negotiations with the Palestinians began. It remained to be seen whether the delicate balance between peace and justice could be struck in solving that most thorny of problems. More forceful provisions in the Dayton Agreements had led to lack of implementation. The choice facing humanity was never easy: it appeared to be between either some creative ambiguity or forthright non-compliance.

44. Sixthly, the issue of the element of force essential for covering the topic was far from clear. On the one hand, there were the hard-core areas such as the case of populations being driven from their homes through the use or threat of violence. On the other hand, there were more evasive situations, such as during a prolonged military occupation, which had the net effect of driving people from their homes. Still more pervasive were policies of the manipulation of international economic forces to wreak havoc within whole societies under the concept of collective measures that had led millions to leave their countries of origin. The causal link was not always easy to ascertain and could sometimes be concealed, but the result was always the same. He had no doubt that after allowance had been made for the requirement of causation, such situations should certainly be included in any definition of forcible population transfers.

45. Lastly, on the question of the inadequacy of national legal remedies to prevent forcible population transfer, he referred to the dissenting opinion of Justice Murphy of the United States Supreme Court in the case of Japanese Americans, cited in paragraph 39 of his report. The only other case he had been able to find was from seventeenth-century Yemen, when the ruling Imam had wanted to exile the Jews of Yemen to India but was persuaded not to by jurists who argued that the infliction of a collective punishment was incompatible with Islamic law.

46. Turning to the report itself, he suggested that it should be read together with the preliminary (E/CN.4/Sub.2/1993/17 and Corr.1) and progress (E/CN.4/Sub.2/1994 and Corr.1) reports. He had endeavoured to reflect the findings of the multidisciplinary expert seminar, but not always successfully, for few firm inferences could be drawn from conflicting opinions in one discipline, let alone in different disciplines. Those opinions were reflected in paragraphs 10 to 18 of the report. In chapters III and IV, the phenomenon of territorial changes and State succession in relation to population transfers was considered. The concept of a genuine and effective link was explained and cognizance was taken of the work of the International Law Commission on the effect of State succession. Chapter V amplified the contents of previous reports on the much-abused concept of military necessity, especially in the case of prolonged military occupation. Chapter VI discussed the impact of population transfer on economic, social and cultural rights. For ease of reference, annex I enumerated all human rights norms affected by population transfer. On the question of remedies, discussed in chapter VII, he said there was a need to be on guard against those who noted that arrangements for pecuniary compensation were difficult to implement. The function of law in society was to act as a balance against power, not as a recognition of power.

47. He had an open mind on the course of action the Sub-Commission should take, and had presented a range of possibilities in his recommendations, including the preparation of an international instrument; a draft declaration, elaborated by the experts at the seminar, was appended in annex II. The elaboration of an additional protocol to the International Covenants on Human Rights was another possibility, although it might not attract wide adherence and might thus weaken already existing norms. The possibility of establishing a monitoring process and an international fund for the victims of population transfer were also suggested.

48. He was aware of extremely important work done by the United Nations High Commissioner for Refugees in the field of population transfer, and noted that population transfer might occur at an accelerated rate in a world of post-modern tribalism. He hoped that a mechanism could be found to combine the work of the various bodies working on the topic.

49. In conclusion, the topic of forcible population transfer was a very important one because it touched on the fundamental questions of peace and justice and was also situated at the intersection of law and politics. It affected the lives of millions, and touched on everyone's sensibilities and deeply held convictions.

50. Mrs. DAES asked whether the Special Rapporteur had any special request to the Sub-Commission for action on his final report.

51. Mr. AL-KHASAWNEH, Special Rapporteur on the human rights dimensions of population transfer, said that the Sub-Commission might consider the possibility of publishing the report if it felt his study was of sufficient worth.

THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS:

(a) THE INTERNATIONAL ECONOMIC ORDER AND THE PROMOTION OF HUMAN RIGHTS;

(b) THE REALIZATION OF THE RIGHT TO DEVELOPMENT;

(c) THE QUESTION OF TRANSNATIONAL CORPORATIONS;

(d) THE REALIZATION OF THE RIGHT TO EDUCATION, INCLUDING EDUCATION IN HUMAN RIGHTS

(agenda item 4) (continued) (E/CN.4/Sub.2/1997/9)

52. The CHAIRMAN said that the officers of the Sub-Commission had proposed that the discussion of the final report on the relationship between the enjoyment of human rights, in particular economic, social and cultural rights, and income distribution (E/CN.4/Sub.2/1997/9) should be deferred because, owing to its late distribution in the various official languages, there had been insufficient time to consider and analyse it in depth. In addition, he had been asked, as Special Rapporteur, to prepare a summary of the three previous reports. He requested members of the Sub-Commission and NGOs who had already prepared statements on the report to transmit them to him for incorporation in his submission to the next session.

53. If he heard no objection, he would take it that the Sub-Commission agreed to defer discussion of the relationship between human rights and income distribution until the next session.

54. It was so decided.

THE ADMINISTRATION OF JUSTICE AND HUMAN RIGHTS:

(a) QUESTION OF HUMAN RIGHTS AND STATES OF EMERGENCY;

(b) APPLICATION OF INTERNATIONAL STANDARDS CONCERNING THE HUMAN RIGHTS OF DETAINED JUVENILES AND THE JUDICIAL PROTECTION OF CHILDREN;

(c) GROSS AND MASSIVE VIOLATIONS OF HUMAN RIGHTS AS AN INTERNATIONAL CRIME;

(d) JUVENILE JUSTICE

(agenda item 9) (E/CN.4/Sub.2/1997/19 and Add.1, 20, 29 and 32; E/CN.4/1998/5-E/CN.4/Sub.2/1997/39; E/CN.4/Sub.2/1997/NGO/7, 8, 20 and 27)

55. Mr. DESPOUY, Special Rapporteur on human rights and states of emergency, introducing his tenth annual report and list of States which, since 1 January 1985, had proclaimed, extended or terminated a state of emergency (E/CN.4/Sub.2/1997/19 and Add.1) said that, in his view, tremendous progress had been made in recent years, particularly since the late 1970s, in the regulation of states of emergency in terms of both standard-setting and international supervision. Until some 20 years previously, there had been a

great deal of confusion regarding the rules that were applicable in situations of crisis. With the entry into force of the two International Covenants on Human Rights and other regional human rights instruments, the right of individuals to take action at the international level had finally been recognized. It had not previously been possible to mention individual countries that were violating human rights in a public forum. Any discussions of such matters had taken place in camera. The first study of states of emergency submitted by the Sub-Commission's expert, Mrs. Questiaux, in 1982 (E/CN.4/Sub.2/1982/15) had been of great significance. While Governments had finally conceded that international supervision of human rights in normal circumstances was not necessarily a form of interference in their internal affairs, they considered that States must be free to handle emergencies as they saw fit. Some Latin American States claimed that they were faced with situations of undeclared war and therefore had no option but to suspend human rights. At the same time, they claimed that the rules of international humanitarian law did not apply in the absence of a war between nations. Fortunately, the world had changed radically in the meantime. States of emergency were subject to clear-cut rules and international supervision by human rights treaty monitoring bodies and the Special Rapporteur.

56. In addition to reviewing the principles governing states of emergency such as proportionality and the existence of an exceptional threat, the report endeavoured to provide an overview of developments in international law in general, particularly with respect to the inviolability of certain principles. The entry into force of such instruments as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment expressly prohibited any derogation from the right to security of person. Many valuable precedents had also been established by, for example, the convention monitoring bodies of the International Labour Organization (ILO) and the case law of the International Court of Justice. The list of non-derogable rights had been greatly extended.

57. The report went on to consider irregularities in the application of states of emergency, for example de facto states of emergency and the increasing sophistication and institutionalization of states of emergency. In recent years, there had been a number of cases of breakdown of the institutional order, for example in certain African countries and in the former Yugoslavia. In the conflicts associated with those crises, the civilian population had been completely deprived of State protection. It was essential to examine the causes of such conflicts and the way in which they developed. They seemed to be generated by a combination of elements involving not just the collapse of legal structures but also a weakening of the restraints associated with the existence of the State and many other social and economic factors.

58. Lastly, the report considered the impact of states of emergency on institutions, the rule of law and human rights. When non-derogable rights were suspended, states of emergency were liable to degenerate, leading in extreme situations to genocide and ethnic cleansing.

59. He considered that the Commission on Human Rights should pay more attention to the adverse impact of states of emergency on the enjoyment of human rights and had reiterated his recommendation that it should appoint a

special rapporteur or set up a working group to carry out that task. The Centre for Human Rights and the High Commissioner for Human Rights could also make an important contribution through preventive diplomacy and establishment of a linkage between human rights and states of emergency.

60. The annual list of States which had proclaimed, extended or terminated a state of emergency was contained in document E/CN.4/Sub.2/1997/19/Add.1.

61. Mr. FIX ZAMUDIO said that it had been very difficult to regulate declarations of states of emergency because it had been accepted for many years that they were entirely at the discretion of Governments and a manifestation of the sovereignty of States. In almost all cases, they had been used as a form of "constitutional dictatorship". As noted by the Special Rapporteur (E/CN.4/Sub.2/1997/19), thanks to the gradual development of international law and human rights, states of emergency were no longer an exclusively internal affair but were subject to generally accepted international supervision. A further paradox, however, was the existence of what amounted to "permanent states of emergency". He referred in particular to a Latin American State where a state of emergency had been in place for 30 years.

62. States of emergency could be used for two different purposes. While they were frequently employed to bolster authoritarian regimes, they should really serve the opposite purpose of defending constitutional structures from hazards associated with conflicts or other similar events and protecting individual human rights from the consequences of political, social and economic crises and natural disasters.

63. The Special Rapporteur had specified the principles that should govern states of emergency, which must be placed firmly within the field of law to dispel any mistaken interpretations linking them with discretionary power to exercise authority during crises. Those principles were: legality; proclamation; notification; time limitation; exceptional threat; proportionality; non-discrimination; and compatibility, concordance and complementarity of the various norms of international law. In the light of those principles, the Special Rapporteur had described the norms that should serve as models for national legislation to bring it into line with the provisions, principles and values of international law relating to human rights and humanitarian law. That section of the report was of great importance inasmuch as States parties to international treaties had undertaken to reform their internal legal systems in such a way as to enforce the provisions of the treaties concerned.

64. The Special Rapporteur's comments on the impact of states of emergency on institutions and the rule of law were also of signal importance, particularly those regarding the judiciary. The authority of judges tended to be severely curtailed by states of emergency when their implications were incompatible with the constitution, legislation and obligations under international law. Fortunately, it had recently become acceptable for judges to analyse such compatibility, particularly by application of the concept of reasonableness. In that connection, it was important to stress the fact that habeas corpus and amparo were non-derogable rights.

65. He appreciated the Special Rapporteur's observations concerning the extensive use of states of emergency, especially in Latin America and even under constitutional regimes, to subject civilians to military jurisdiction, a serious violation of the important fundamental right to be tried by a civilian court.

66. He also supported the Special Rapporteur's recommendations, particularly the recommendation to the United Nations Human Rights Committee concerning the non-derogability of the right of habeas corpus, which coincided with a request directed by Mr. Weissbrodt through the Sub-Commission to the same body concerning the desirability of a new general comment to establish the non-derogability of the rights of habeas corpus and amparo during states of emergency.

67. Mrs. Warzazi took the Chair.

68. Mr. ALI KHAN said that the report on human rights and states of emergency (E/CN.4/Sub.2/1997/19) dealt with a question of universal significance, that of fundamental freedoms. Section 3 on non-derogability of the exercise of fundamental human rights was of particular importance. It noted that the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights specified clearly that certain fundamental human rights were not negotiable under any circumstances. The idea of fundamental freedoms was also contained in Article 3.1 of the Charter of the United Nations.

69. The Special Rapporteur had also referred to the question of reservations to treaties. He felt that even more could have been said on the subject in the context of non-derogability. Reservations, which were in some cases contrary to the very spirit of the multilateral instrument concerned, had become a very common practice. In that connection, he recalled a reservation entered by the United States of America to Article 36 of the Statute of the International Court of Justice to the effect that it would submit to the Court's jurisdiction in respect of all matters except those which fell within the domestic jurisdiction of the United States as determined by the United States.

70. Secondly, habeas corpus was a fundamental principle, but on occasion it was subject to technical difficulties: sometimes, for example, the person being sought could not - or reportedly could not - be found. He therefore commended to those of a legal cast of mind the desirability of discussing the concept and scope of mandamus, another prerogative writ primarily concerned with the enforcement of duties, even in states of emergency.

71. Another admirable aspect of the report was the chapter on the impact of states of emergency on institutions and on the rule of law, with particular reference to states of emergency that were not notified and those that were perpetuated. He took it that in stressing the responsibility of international organizations the Special Rapporteur, quite rightly, considered that such situations should be monitored, since they were crucial to the maintenance of the rule of law. His discussion of arbitrary detention in states of

emergency, and the independence of the judiciary - which was the main hope of those deprived of liberty and freedom of speech - was the cornerstone of the report.

72. The recommendations to States (para. 184) were unexceptionable, but the first risked being no more than a pious wish; it was hard to see how the rigid concept of the sovereignty of States could be overcome. It was a matter that the next report of the Special Rapporteur could consider. Of greater importance were the recommendations to the Human Rights Committee (para. 187), since without the recommended monitoring mechanism the recommendations to the Commission and the Sub-Commission would be of no use.

73. The report as a whole represented a great step forward on an issue of supreme importance in all parts of the world.

74. Mr. WEISSBRODT welcomed the remarks of Mr. Fix Zamudio, whose court had played an important role in dealing with the issues involved in states of emergency, and those of Mr. Ali Khan. He too was concerned about reservations that might undermine the object and purpose of a treaty. As for habeas corpus, it was a matter that had been fruitfully discussed in the working group on the administration of justice and the question of compensation, where it had been decided that habeas corpus should be non-derogable.

75. The Special Rapporteur had since 1987 served the Sub-Commission in gathering data from a wide range of sources to highlight the conditions in countries that had proclaimed, extended or terminated states of emergency. He had increased the Sub-Commission's understanding of the various circumstances surrounding emergency situations, enabling it to examine State practices under such circumstances in greater detail. Under article 4 of the International Covenant on Civil and Political Rights, a State party that had officially proclaimed a state of emergency that threatened the life of the nation could derogate from its obligations on a limited number of rights to the extent strictly required by the situation. States parties were required to notify the Secretary-General promptly regarding the nature of the emergency situation and the specific rights that would be limited. The exigencies of a public emergency, however, could never warrant derogation from certain fundamental human rights. The Special Rapporteur had performed a great service in identifying States that had not notified the Secretary-General in such circumstances, and also in identifying rights that should be non-derogable. He had made it clear that the rights protected from derogation under the Covenant were not limited to those enumerated under article 4, notably the right to habeas corpus and the related aspects of amparo, which were crucial to the preservation of other non-derogable rights and particularly necessary remedies for wrongful arrest and detention. Such non-derogability should be reaffirmed as essential to the protection of the non-derogable rights identified in article 4 and, indeed, to the proper administration of justice.

76. He suggested one alteration that might be considered for future reports. The list of countries that had proclaimed, extended or terminated a state of emergency included 87 States and territories; but a state of emergency was still in force in only 30 of those countries. Perhaps an annual list could be compiled reflecting only those countries in which a de facto or de jure state of emergency was still in force. Attention need not be drawn to those

countries, such as South Africa, whose state of emergency was fully and adequately terminated; it would be sufficient to publish a list of such countries only every 5 to 10 years.

77. Mr. GUISSÉ said that the report (E/CN.4/Sub.2/1997/19) had enunciated a number of important principles. Most human rights were suspended in a state of emergency, which was declared by a decision of the State. If the state of emergency was not justified, the decision was a violation of all rights. For him the main question was how - and how far - victims could receive reparation or compensation. Of all rights at risk in a state of emergency, liberty was the most vulnerable, which meant that habeas corpus and amparo were particularly important. The essence of habeas corpus was the appeal to an authority on the justification of a detention and was not easily achieved during states of emergency. He therefore considered that if a state of emergency was unavoidable the State concerned should make habeas corpus non-derogable, thus providing some guarantee of freedom for the individual to come and go as he pleased. Since habeas corpus was not known under all legal systems, he suggested that future reports could set out a list of rules under the general heading of habeas corpus; it would be of assistance to States and individuals and would help spread the concept of habeas corpus throughout the world.

78. Mr. ZHONG Shukong noted that paragraph 38 of the report (E/CN.4/Sub.2/1997/19) distinguished between three types of situation. All three, however, concerned armed conflict in varying degrees, so he wondered whether, as a finishing touch to his report, the Special Rapporteur might consider adding a paragraph 38 bis, which could read as follows:

> A "tense situation" is caused by a disturbance or by serious activities aimed at subverting the legitimate Government or splitting the country. In such a situation, martial law, or a state of emergency, may be proclaimed for the defence of the Constitution or the defence of the fundamental institutions of the State, which bear responsibility for ensuring the freedom and security of all citizens of the country.

79. The CHAIRMAN asked whether he was proposing an amendment or merely making a recommendation of which the Special Rapporteur should take note.

80. Mr. ZHONG Shukong said that it was in her hands. His hope was, however, that the paragraph would be incorporated, as an appendix, in a note or in any other form.

81. Ms. ZAMPARUTTI (Transnational Radical Party - TRP) said that the international community should devote particular attention to situations in which the death penalty was applied in the absence of minimum legal standards and procedural rights. That was often the case in states of emergency. The "Hands Off Cain" campaign of the Transnational Radical Party intended to call attention to another phenomenon: the application of the death penalty to minors, which was permitted in some 20 States. The number of ratifications to treaties forbidding such actions, however, implied that an international norm existed disallowing such a practice. Reservations on such matters, especially that proposed by the United States of America to the International Covenant on Civil and Political Rights, should be considered inadmissible.

82. TRP and its partner organization Human Rights in China (HRIC) also noted the lack of respect for the human rights of detainees in China, due notably to the lack of independence of the judiciary, the discrepancy between the legal apparatus and the enforcement thereof, the non-observance of the right of appeal and the common use of re-education through labour, an administrative sentence imposed by the police without judicial proceedings. Torture and mistreatment were routine in Chinese detention centres and prison regulations on visiting rights, for example, were often breached.

83. Wei Jingsheng, China's most prominent dissident, had been repeatedly beaten by his fellow inmates, six common criminals who kept watch over him 24 hours a day. The prisoner who had beaten him the most had been publicly commended and given a reduction in his sentence, whereas Wei Jingsheng had been accused of violating prison regulations. His health had deteriorated further - he suffered from a heart condition, high blood pressure and arthritis, and could no longer hold his head erect because of damage to his neck - but prison officials had denied his request for appropriate medical care, although the denial of such care was considered a form of torture by the Special Rapporteur on the question of torture. Wei Jingsheng was but one of many; others continued to be subject to re-education through labour, a form of detention judged inherently arbitrary by the Working Group on Arbitrary Detention. In that connection, TRP and HRIC regretted that, owing to its impending visit to China, the Working Group had decided to suspend the examination of communications regarding Chinese detainees. She urged the Chinese Government to change its policy on the issues that she had mentioned.

84. Mr. GARCIA (Pax Romana) said that most African countries were suffering an effective dismantling of public powers. Sometimes that led to tribal rivalries, as in Burundi, where arbitrary detentions had been carried out in June by members of the law enforcement services in Ngozi and Kayanza, in order to obtain bribes from detainees on an ethnic basis. The ruling Tutsis had started to establish paramilitary forces to attack the Hutu population in Tutsi-dominated areas. The Government had executed six arbitrarily detained people on 31 July - three Hutu, two Tutsi and one Pygmi - to demonstrate its impartiality; but such brutal criminal action would not improve its international reputation.

85. Kenya was an example of a dictatorship attempting to preserve power. In December 1996 the police had shot dead two students demonstrating on the campus of Kenyatta University. A student leader, Salomon Muruli, had been kidnapped by policemen, detained for a week, beaten up and left for dead. After receiving a death threat if he dared identify the police officers who had kidnapped him, he was killed when a bomb exploded in his room. On 5 and 7 July 1997 many students and others had been killed during demonstrations on reforming education and the Constitution. Those responsible were still unpunished.

86. Sri Lanka was in clear breach of the habeas corpus principle, having detained 1,700 young Tamils without trial or investigation, 300 of them for as long as 5 years. Pax Romana, supported by several other NGOs, requested the Sub-Commission to monitor the situation in Sri Lanka and to ensure that it observed the international human rights standards on detainees and in particular the right to habeas corpus.

87. Two years earlier the Peruvian Government had committed itself to reviewing its Amnesty Act, which exempted from prosecution and punishment crimes against humanity in which State agents had been involved between 1980 and 1995. The Act, and its interpretative act, which denied access to proper judicial remedies, were both still in force. Some of the perpetrators of those crimes were currently suspected of new killings and tortures. Pax Romana wondered whether the Peruvian Government took the United Nations and its experts seriously.

88. He emphasized Pax Romana's support for measures to enforce States' liability and victims' compensation rights, in line with the emerging international understanding that the victim of violations of human rights was one of the actors, not one of the objects. The right to compensation under an international jurisdiction could achieve the end of impunity.

The meeting rose at 1.10 p.m.